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No. 99-296

In The

Supreme Court of the United States

DEBRA WALKER, et al.,

Petitioners,

v.

CITY OF MESQUITE, TX, et al.,

Respondents.

On Petition For A Writ Of Certiorari
The United States Court Of Appeals
For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS IN RESPONSE TO HOMEOWNERS' OPPOSITION

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Reply Brief for Petitioners in Response to Homeowners' Opposition

After having waived their right to reply to the petition, the respondent Homeowners were directed by the Court to respond. The Homeowners now spend 30 pages seeking to defend the decision below. But that attempted defense only underscores the errors committed by the Fifth Circuit and the need for review by this Court.

1. The Homeowners' strongest defense of the Fifth Circuit ruling is that the appeals court properly exercised its discretion and balanced all the relevant factors in a manner that this Court should not disturb. For example, on page 17 of their opposition, the Homeowners state that "Petitioners have pointed to no evidence that would show that the Fifth Circuit abused its discretion in reaching this conclusion." The Homeowners' brief has an entire section of argument captioned "The Fifth Circuit Decision Correctly Balanced the Rights of the Competing Parties in Accordance with the Standards Established by this Court." Homeowners' Brief pages 20-24.

But that defense is, in effect, an admission that at least one of the grounds upon which the petition seeks review is justified – the Fifth Circuit overstepped its proper role and substituted its judgment for the district court's exercise of discretion. The exercise of remedial discretion and the balancing of interests is the job of the district court, not the court of appeals. *U.S. v. Paradise*, 480 U.S. 149, 184 (1987).

2. The Homeowners criticize the district court for adopting the written findings of fact proposed by the

petitioners. In addition to the written findings, the district court entered extensive oral findings and conclusions into the record of the case. App. 36a-65a. The Homeowners do not even claim that those 30 pages of oral findings and conclusions are not the product of the district court's independent review of the facts and arguments in the case. These oral findings alone would have been sufficient to support the district court's ruling. Fed. R. Civ. P. 52(a). Neither the oral nor the written findings of fact were overturned by the Fifth Circuit. App. 20a, App. 24a.

The district court's written opinion pointed out that many of the statements of fact are from stipulations of fact between the Homeowners and petitioners or from the statements of fact in the petitioners' motion for summary judgment which the district court found were established by the evidence cited in support of those statements. App. 72a n. 9. It should not be surprising to find extensive reliance on such stipulated or otherwise undisputed statements of fact in findings for a case as convoluted and complex as this one. App. 3a. The presence of such statements does not show any abdication of the district court's authority or discretion. *Anderson v. City of Bessemer*, 470 U.S. 564, 572-573 (1985); *American River Trans. Co. v. Kavokaliakra SS*, 148 F.3d 446, 448 (5th Cir. 1998).

3. The homeowners argue against granting certiorari on the grounds that the HUD site selection regulation is not directly at issue and that "There is nothing in the Fifth Circuit's decision which prohibits race-based site selection that results from voluntary agreements entered into between HUD and local housing agencies

outside of the context of court-ordered desegregation" Homeowners' Brief page 7.

Petitioners do not argue that the constitutionality of the HUD public housing site selection regulation, 24 CFR § 941.202(c) was expressly decided by the Fifth Circuit. Their argument is rather that the Fifth Circuit decision calls into question the national policy favoring the use of race-conscious public housing site selection criteria upon which that regulation is based and this Court should resolve this issue of great public importance. Pet. 9-13.

The Homeowners' argument that the Fifth Circuit decision does not reach voluntary, agreed, site selection decisions between HUD and local housing authorities is contradicted by the record in this case. There is such an agreement between HUD and the local housing authority on site selection for the very units at issue. The challenged sites were submitted by DHA to HUD for approval under the site selection regulation. HUD approved the sites under the site selection regulation. App. 104a, 104a n. 117, 118. The agreement under the site selection regulation and process has not protected the site selection decisions from the Fifth Circuit's constitutional attack. The implementation of this DHA site selection submission and HUD's approval of the sites is still enjoined by the Fifth Circuit's stay of construction. App. 35a.

4. The Homeowners also seek to defend the Fifth Circuit's ruling on the grounds that its approach to the use of race-conscious remedies is tentative and will not preclude the consideration of race in fashioning remedies at a future stage of the case. Homeowners' Brief page 13.

While one statement in the opinion does suggest that future race-conscious site selection may be justified, App. 34a, the consistent message of the decision is that the prohibition on race-conscious site selection is absolute and unqualified:

> "Additionally, it is unnecessary to employ the race-conscious site selection criterion ordered by the court even if new construction or acquisition of public housing occurs. The district court may proceed with new construction as part of his remedial plan, but he may not do so using a race-conscious site selection criterion." App. 27a.

> "Because there are promising, non-racially discriminatory ways to continue desegregating public housing in Dallas, the provision of the court's remedial order calling for the construction or acquisition of units of public housing in 'predominantly white' areas is unconstitutional." App. 34a.

> "Third, this opinion does not preclude the construction or acquisition of additional public housing if sites are selected by means of nonracial criteria." App. 34a.

The Fifth Circuit's prohibition is certainly absolute with respect to the current allocation of public housing units waiting to be used and including the units proposed for the Homeowners' area.

> "As discussed previously, the district court may entertain any number of site selection criteria regarding new public housing units, except for race. No one suggests that the 474 units should not be built, only that requiring that they

be built using a race-conscious site selection criterion is not narrowly tailored." App. 32a.

If these units are built under the Fifth Circuit decision, the sites cannot be chosen using a race-conscious site selection standard.

For the foregoing reasons and those stated in the petition, petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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